DRIVER'S ADM'R v. SOUTHERN RY. CO.

Supreme Court of Appeals of Virginia.

March 9, 1905.

[49 S. E. 1000.]

MASTER AND SERVANT—RAILROADS—COLLISION—WARNING SIGNALS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULES—EVIDENCE—PLEADING—BILL OF PARTICULARS.

1. Though a bill of exceptions is the usual mode of making the court's action on a motion and exceptions thereto a part of the record, an order of court showing that plaintiff moved the court to require defendant to file a statement of its grounds of defense, that the motion was overruled, and the plaintiff excepted, was sufficient.
2. Under Code 1887, sec. 3249 [Va. Code 1904, p. 1709], providing that the court in any action may require a statement of the particulars of the claim or ground of defense, whether or not such statement shall be required is within the trial court's discretion.

   [ED. NOTE.—For cases in point, see vol. 39, Cent. Dig. Pleading, sec. 951.]
3. Where, in an action against a railroad company for death of an employé, the grounds of defense actually relied on were defendant's want of negligence and negligence of decedent and his fellow servants, the court's refusal to require a statement of the ground of defense was not prejudicial to plaintiff.
4. Where a train properly made up at its starting point was changed by the conductor, evidence relating thereto, not tending to show authority to make the change, was properly rejected.
5. In an action against a railroad company for death resulting from collision, evidence showing a habitual disregard by employés of a rule requiring the placing of warning signals on the stoppage of trains on the track is properly excluded where it is not shown that the company had notice of the violations.
6. A railroad company is not chargeable with negligence in failing to maintain telegraph offices along its line not more than 10 miles apart, as required by Acts 1891-92, p. 969, c. 614, sec. 9 [Va. Code 1904, p. 672, sec. 1294d], where the accident occurred within less than 10 miles of a telegraph station, and before the train had reached another station where such an office was kept or required to be kept, and a strict compliance with the act would not have avoided the accident.
7. Where a train properly made up at the starting point was afterwards changed by the conductor, a fellow servant, without authority, and in violation of the company's rules, the company was not negligent because the train was improperly and dangerously made up.
8. Negligence in failing to give a train in advance special warning orders of a train following, which was dangerously made up, is not shown where it is

not proven to have been the company's duty to notify such trains, and the dangerous make-up was not known.

9. Where the proximate cause of a decedent's death by collision was his own failure to comply with the company's rules regarding the placing of danger signals, the company's negligence, if any, in using an engine in an imperfect condition, did not make it liable, as it was not a case of concurring negligence.

Error to Circuit Court, Prince William County.

Action by the administrator of Walter E. Driver against the Southern Railway Company. From a judgment for defendant, plaintiff brings error. *Affirmed.*

Roller & Martz, R. A. Hutchinson, Marshall McCormick, and *Sipe & Harris,* for plaintiff in error.

R. Walton Moore, for defendant in error.

BUCHANAN, J.:

This action was brought by the personal representative of Walter E. Driver to recover damages for the death of the plaintiff's intestate, caused by the alleged negligence of the Southern Railway Company prior to the constitutional and statutory changes made in the law of master and servant.

The deceased was the flagman (rear brakeman) on an extra freight train, No. 546, composed of 11 loaded and 4 empty cars, which left Manassas for Strasburg at 3:50 a. m., November 15, 1901, on a single-track, unblocked branch line of the defendant company, which is used day and night for the movement of scheduled and unscheduled trains. From some cause the engine did not steam well that morning, and made very poor speed. When the train reached Wellington, five miles from, and the first station west of, Manassas, it remained there some 25 minutes for the purpose of shifting cars and getting up steam. When the train got under way, it ran about half a mile, when it was stopped again for want of steam for about 10 minutes. After getting up steam, it started again, and, having gone a mile or a little more, and while running at the rate of 12 or 15 miles an hour, was run into by another extra train, No. 832, going in the same direction; and the plaintiff's intestate, who was in the caboose at the rear end of train No. 546, was killed. No. 832 was under orders to go to a station west of the

point where the accident occurred, and left Manassas from three-quarters to one hour after No. 546 left there. No. 832 was properly made up at Alexandria, its starting point, but when it reached Manassas the conductor in charge of it turned the engine around, placed the caboose in front of the tender, and started the train towards its destination; and while running at the rate of 25 miles an hour ran into No. 546.

The grounds of negligence charged and relied on in the declaration, as stated in the petition for the writ of error, are that the defendant company disregarded the requirements of the statute (Acts 1891-92, p. 969, c. 614, sec. 9 [Va. Code 1904, p. 672, sec. 1294d]) as to maintaining and operating telegraph offices for the protection of its train service; in dispatching No. 832 improperly and dangerously made up; in failing to give special warning to No. 832 to proceed under control, and to look out for No. 546; and in failing to give No. 546 special orders that No. 832 was following in its dangerous make-up; and in failing to furnish an engine with sufficient power to move No. 546 in the usual way.

The first assignment of error is to the refusal of the court to require the defendant company to file a statement of its ground of defense.

It is insisted by the defendant that this assignment of error cannot be considered, because the ruling of the court complained of was not made a part of the record by a bill of exceptions.

While a bill of exceptions is the usual and regular mode of making the court's action upon such a motion and exception thereto a part of the record, it is not the only mode. The order or judgment of the court may itself show all that would be necessary for a bill of exceptions to show in order to make the matter a part of the record, and if it does it is sufficient. *White* v. *Toncray,* 9 Leigh, 347; *Mitchell etc.* v. *Baratta,* 17 Gratt. 445; *Central Land Co.* v. *Obenchain,* 92 Va. 130, 22 S. E. 876.

The order of the court shows that the plaintiff moved the court to require the defendant to file a statement of its grounds of defense, that the court overruled his motion, and that the plaintiff excepted to the court's action. This is all that a bill of exceptions would have shown, and it is sufficient.

Section 3249 of the Code of 1887 (Va. Code 1904, p. 1709) provides that "in any action or motion the court may order a state-

ment to be filed of the particulars of the claim or of the ground of defense, and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party so plainly as to give the adverse party notice of its character."

There is no inflexible rule as to the classes of cases in which a statement of the particulars of the plaintiff's claim or of the defendant's ground of defense will be required, but it rests in the sound judicial discretion of the court. This is the construction which has been placed upon the statute by the Massachusetts courts, from whose Code it was taken. *Richmond* v. *Leaker,* 99 Va. 1, 37 S. E. 348; *Blake* v. *Everett,* 1 Allen, 248; *Commonwealth* v. *Giles,* 1 Gray, 466.

While the question of whether or not such statement shall be required to be filed is within the discretion of the trial court, to be soundly exercised under all the circumstances of the particular case, its action in granting or refusing such request will be supervised by the appellate court; but such action will not be reversed unless it is plainly erroneous. *Hites' Case,* 96 Va. 489, 31 S. E. 895; *Payne* v. *Zell,* 98 Va. 294, 36 S. E. 379.

The grounds of defense actually relied on by the defendant were those generally, if not invariably, relied on in such cases out of abundant caution on the part of counsel, viz., that the defendant was not negligent, or, if it was, the proximate cause of the accident was the negligence of the injured employe and his fellow servants. How the refusal of the court to require such a statement as that could have prejudiced the plaintiff we are unable to see.

The second, third, and fourth assignments of error may be considered together. They are all based upon rulings of the court in reference to the improper make-up of No. 832 at Manassas.

There is no question that the conductor, McDonald, directed it to be made up in the condition it was when it left that point. The plaintiff sought to show that the defendant intrusted him with the duty of making up the train, which it is agreed was one of the nonassignable duties of the master. The defendant, on the other hand, claimed that the train was properly made up by the defendant company in Alexandria, the point from which the train started, and, having been made up properly there, the act of the conductor at Manassas in turning the engine around and running it backward

with the caboose ahead of the tender was without authority of the defendant, and in violation of its rules. The court held that, if the plaintiff could show "authority from the master to change the order of that train at Manassas, why then the master is liable. It was the duty of the master to have sent that train out in proper form at the point of origin. If it was changed without orders, or contrary to the rule of the company, afterwards, they are not liable."

This, we think, was a correct statement of the law. But the plaintiff did not avow that it could show that McDonald was authorized by the company to make the change, nor does the evidence which was rejected, as set out in bills of exceptions numbered 1 and 2, when considered in connection with what preceded and followed it, tend to show such authority. It was therefore properly rejected.

The evidence which was permitted to go to the jury over the objection of the plaintiff, as shown by bill of exceptions No. 3, if error at all, was harmless error. It seems to have been a concession all through the case that the change in the make-up of the train at Manassas was done by McDonald's orders. The point in controversy was not as to the fact that he ordered the change, but as to his authority to make it.

The next assignment of error is to the refusal of the court to permit the plaintiff to show that the employés of the defendant habitually disregarded rule No. 99, which provided that: "When a train is stopped at an unusual point or is delayed at a regular stopover three minutes, or when it fails to make its schedule time, the flagman must immediately go back with danger signals to stop any train moving in the same direction. At a point one-half of a mile (or 18 telegraph poles) from the rear of his train he must put torpedo on the rail on engineman's side; he must then continue to go back at least three-fourths of a mile (or 27 telegraph poles) from the rear of his train and place two torpedoes on the rail ten yards apart from rail length, when he may return to a point one-half of a mile (or 18 telegraph poles) from the rear of train, and he must remain there until re-called, but if a passenger train is due within ten minutes he must remain until it arrives. When he comes in he will remove the torpedoes nearest the train, but the two torpedoes must be left on the rail as a caution to any following

train. If the delay occurs upon single track, and it becomes necessary to protect the front of the train, or if any other track is obstructed, the front brakeman must go forward and use the same precautions. If the front brakeman is unable to leave the train, the fireman must be sent in his place. In descending grades or during blinding storms or fog, the flagman must go as much farther than the distance named above as will insure absolute safety, placing the torpedoes at relatively greater distances from the obstruction."

The importance of this rule not only appears from the rule itself, but is referred to and emphasized by other rules of the company. The bill of exceptions sets out what the plaintiff expected to prove, but it does not state that he expected to prove that the defendant knew of such violation, or neglected to enforce the rule. On the contrary, the court certifies that certain rules of the defendant (of which No. 99 was one) were admitted and agreed by the parties to be the identical rules in force and effect prior to and at the time of the accident. One of the grounds upon which the court bases its refusal to admit the evidence rejected was that it was not shown that the defendant company had notice of the violation of rule 99.

This was a sufficient ground upon which to justify its action, under the facts disclosed, even if the other grounds were insufficient, as to which we express no opinion; for it is settled law that an employé will not be absolved from the imputation of contributory negligence for violating a rule of the master, made for his own as well as for the protection of others, because that rule is habitually disregarded, unless it appears (and the burden is upon the plaintiff to show this) that it was done with the knowledge of the master, or he had so neglected to enforce it as that his conduct amounted to a suspension of the rule. *Wright* v. *Southern Ry. Co.*, 101 Va. 36, 42 S. E. 913.

The remaining assignment of error is to the action of the court in sustaining the defendant's demurrer to the evidence.

The plaintiff insists that the defendant was guilty of negligence in failing to maintain and operate telegraph offices as required by statute:

By section 9, c. 614, p. 969, Acts 1891-'92 [Va. Code 1904, p. 672, sec. 1294d], it is provided that: "Every railroad company doing business in this state shall establish and maintain along its

line, at depots or stations, not more than ten miles apart, telegraphic offices, to be operated for the protection of its train service by competent persons in the employ of such company: provided, however, that the railroad commissioner may grant such company, in special cases, permission to have its telegraphic offices at the distance from each other greater than ten but not more than fifteen miles. It shall be the duty of every such operator to telegraph the arrival and departure of every train, as soon as it shall leave the depot or station, to the train dispatcher or other person regulating the running of trains, and if there be no such persons, then to the nearest telegraph office in the direction in which such train is going. The person receiving the telegram shall forthwith give such order or notification by telegraph as may be necessary to prevent any collision of trains."

The accident occurred within less than 10 miles of Manassas, where there was a station with a telegraph office, and before the train had reached another station where there was such an office kept or required to be kept. If there had been a telegraph office in operation at the next station beyond where the accident occurred and within 10 miles of Manassas, a strict compliance with the provisions of the statute would not have avoided the accident, since the statute imposed no duty upon the defendant as to the train in question until it had reached such station.

Neither was there any negligence shown in dispatching No. 832 improperly and dangerously made up, since the train was properly made up at Alexandria, and was afterwards changed by the conductor, a fellow servant (*N & W. Ry. Co.* v. *Houchins,* 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791), without authority, and in violation of the rules of the defendant.

Another ground relied on to show negligence on the part of the defendant, was its failure "to give special warning orders to No. 832 to proceed under control, and to keep a lookout for No. 546, and in failing to give No. 546 special warning orders that No. 832 was following in its dangerous make-up." The evidence was that No. 832 was notified that No. 546 was ahead, and to keep a lookout for it. It was not shown to be the duty of the defendant to notify No. 546 that No. 832 was following and it could not have given any warning of the latter's dangerous make-up because it did not know it.

The remaining charge of negligence on the part of the defendant is "in failing to furnish an engine with sufficient power to move No. 546 in the usual way."

"It would," as was said by the Court of Appeals of New York in *Bajus* v. *Syracuse Co.,* 103 N. Y. 312, 8 N. E. 529, 57 Am. Rep. 723, "impose upon every railroad company very embarrassing, onerous, and unjust responsibilities, if in the case of accidents with moving trains it was to be the subject of inquiry before a jury whether the particular accident might not have been avoided with an engine of greater or less power. If this engine, drawing a train upon a railroad, had, in consequence of its imperfect condition, become stalled, so that passengers and freight failed to reach their destination in time, or if, when placed at rest, it had run away in consequence of the leakage through its throttle valve, different questions would have been presented for our consideration. But without violating any rules that have been laid down for the protection of the employés, we are constrained to hold in this case that this was not, as to the plaintiff, a dangerous engine; that it was reasonably safe and proper; and that there was no negligence on the part of the defendant in putting it to the service in which it was employed; and that, therefore, upon the facts as they now appear, the plaintiff has no cause of action against the defendant."

That seems to us to be a correct statement of the rule of law applicable to cases like this. But if the defendant had been guilty of negligence, as to the plaintiff's intestate, in using the engine as it did in its then condition, that negligence was not the proximate cause of the injury, and therefore it was not a case of concurring negligence. *N. & W. Ry. Co.* v. *Cromer,* 99 Va. 763, 792, 40 S. E. 54, and authorities cited. The proximate cause of the death of the plaintiff's unfortunate intestate, as clearly appears from the evidence, was his own failure to comply with rule 99 of the defendant, which made it his duty, when his train was delayed at Wellington more than three minutes, and when it was stopped west of that station at an unusual place, to go back with danger signals to warn any train moving in the same direction. If he had done this, the accident would have been avoided. It is insisted, however, that it is not clearly proved that he did not comply with that rule. We think it is; but, if he did comply with it, then the proximate cause of the accident was the negligence of his fellow servant, the

conductor on No. 836, in turning his engine around at Manassas and running it backward, with the caboose ahead of it, so that the engineer did not and could not see No. 546 as he approached it. The evidence is uncontradicted that, but for this change in the make-up of the train by the conductor, No. 546 could have been seen, and the collision avoided.

We are of opinion that there is no error in the judgment complained of, and that it must be affirmed.

NOTE.—Va. Code 1904, sec. 3249 (W. Va. Code 1899, ch. 130, sec. 46) provides that "In any action or motion, the court may order a statement to be filed of the particulars of the claim, or of the ground of defence; and, if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party, so plainly as to give the adverse party notice of its character."

In considering this section in the above opinion the court said: "There is no inflexible rule as to the classes of cases in which a statement of the particulars of the plaintiff's claim or of the defendant's ground of defense will be required, but it rests in the sound judicial discretion of the court. This is the construction which has been placed upon the statute by the Massachusetts courts, from whose Code it was taken. *Richmond* v. *Leaker*, 99 Va. 1, 37 S. E. 348; *Blake* v. *Everett*, 1 Allen 248; *Commonwealth* v. *Giles*, 1 Gray 466. While the question of whether or not such statement shall be required to be filed is within the discretion of the trial court, to be soundly exercised under all the circumstances of the particular case, its action in granting or refusing such request will be supervised by the appellate court; but such action will not be reversed unless it is plainly erroneous. *Hite's Case*, 96 Va. 489, 31 S. E. 895; *Payne* v. *Zell*, 98 Va. 294, 36 S E. 379."

It seems to be well settled, however, that a statement of particulars cannot be required where the declaration gives the grounds of action and particulars of claim with sufficient definiteness to give the defendant notice thereof. *Clarke* v. *Ohio*, 39 W. Va. 732, 20 S. E. 696; *Richmond* v. *Leaker*, 99 Va. 1, 37 S. E. 348; *Richmond* v. *Payne*, 86 Va. 481, 10 S. E. 749. So, it has been held that, in an action to recover damages for personal injury, where the declaration avers that it was the duty of the defendant to furnish "suitable and reasonable tools," etc., with which to do certain work, it is unnecessary to aver what the tools were or to furnish any bill of particulars thereof. *Richmond Locomotive Works* v. *Ford*, 94 Va. 627, 27 S. E. 508. (But see *Hortenstine* v. *Virginia-Carolina Ry. Co.*, 102 Va. 916, 10 Va. Law Reg. 312, 547, 793, as to necessary averments in declaration.) As to effect of failure to file particulars, see 10 Va. Law Reg. 741.

For further authorities construing this section, see annotations in Va. Code 1904, and Justis' Annotation to W. Va. Code, ch. 130, sec. 46. G. C. G.